In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-550

PERALTA FEDERATION OF TEACHERS, LOCAL 1603,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO,
Petitioner,

vs.

PERALTA COMMUNITY COLLEGE DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF IN OPPOSITION

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The Respondent Peralta Community College District respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the California Supreme Court's Decision in this case. That opinion is reported at 24 Cal.3d 369, 155 Cal.Rptr. 679 and 595 P.2d 105.

OPINIONS BELOW

The opinion of the Supreme Court of California, reversing the Superior Court for the County of Alameda, is reported at 24 Cal.3d 369, 155 Cal.Rptr. 679, and 595 P.2d

105. That opinion is set forth in the Appendix to the Petition for Writ of Certiorari[1] at p. 2.

The April 25, 1977 opinion of the Court of Appeal of the State of California, which is unreported,[2] is set forth in the Appendix to the Petition at p. 62.

The July 25, 1975 Judgment of the Superior Court is unreported. It appears in the Appendix to the Petition at p. 62.

The Superior Court's July 25, 1975 Order for the Issuance of a Peremptory Writ of Mandate is unreported. It is set forth in the Appendix to the Petition at p. 65.

The Superior Court's July 25, 1975 Statement of Findings of Fact and Conclusions of Law is unreported. It is set forth in the Appendix to the Petition at p. 67.

JURISDICTION

The judgment of the Supreme Court of the State of California was entered on May 25, 1979, and the Order of that Court denying (without opinion) Petitioners' timely request for a rehearing was filed on July 6, 1979 (Appendix to the Petition at p. 1).

Petitioner[3] seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). As shown more fully

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[1]Hereinafter "Petition."

[2]The opinion of the Court of Appeal was superseded by the granting of a hearing by the California Supreme Court (California Rules of Court No. 976(d)) and may not be cited by a court or party as authority except under certain limited conditions (Rule 977).

[3]The Petitioner is set forth in the caption of the Petition as "PERALTA FEDERATION OF TEACHERS, LOCAL 1603, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, et al." The Petitioner subsequently refers to certain "individual petitioners before

below, this Court does not have jurisdiction over this matter inasmuch as the issues which Petitioner now seeks to raise were not raised, preserved and decided in the courts below.

QUESTIONS PRESENTED

1. Did the Petitioner raise and preserve, and did the California Supreme Court decide, the constitutional question(s) or issue(s) which it now seeks to have heard in this Court, thus giving this Court jurisdiction under 28 U.S.C. § 1257(3)?

2. Does the exclusion of temporary part-time teachers from a statutory tenure and pro rata pay system burden a suspect class or infringe fundamental constitutional rights so as to require application of a strict scrutiny standard under the Equal Protection or Due Process Clauses?

3. Does the exclusion of temporary part-time teachers from the statutory provisions for tenure and pro rata pay meet the minimal rational basis standard required for economic and general social legislation?

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this Court" (Petition, at p. 6). For the purpose of this Brief in Opposition Respondent is proceeding on the belief that the Peralta Federation of Teachers, Local 1603, AFT, AFL-CIO, is petitioning on behalf of those of its members who are part-time instructors with 60% or less of a normal teaching load who were first hired by the Respondent subsequent to November 8, 1967 and were thus aggrieved by the Decision of the California Supreme Court in the instant case. The Petitioner will generally be referred to in the singular herein as the "Petitioner" or the "Federation."

The Respondents before the California Courts were the Peralta Community College District and the Governing Board of the Peralta Community College District. Inasmuch as the Governing Board and the District are, for all relevant legal purposes, one and the same they will be referred to in the singular herein as the "Respondent" or the "District."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fourteenth Amendment:

> Section 1 . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1257

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

California Education Code (Reorganized)[4] Section 87482 [Formerly Section 13337.5]:

> Notwithstanding the provisions of Section 87480 [13337], the governing board of a community college district may employ as an instructor in grade 13 or 14, for a complete school year but not less than a complete semester or quarter during a school year,

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[4]Effective April 30, 1977 the California Legislature reorganized the Education Code. Former Education Code § 13337.5 is now reorganized Education Code § 87482. This Brief will use dual Education Code citations with the former Code section in [brackets], where applicable. All statutory references, unless otherwise indicated, are to the California Education Code.

any person holding appropriate certification documents, and may classify such person as a temporary employee. The employment of such persons shall be based upon the need for additional certificated employees for grades 13 and 14 during a particular semester or quarter because of the higher enrollment of students in those grades during the semester or quarter as compared to the other semester or quarter in the academic year, or because a certificated employee has been granted leave for a semester, quarter, or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board.

Such employment may be pursuant to contract fixing a salary for the entire semester or quarter.

No person shall be so employed by any one district for more than two semesters or quarters within any period of three consecutive years.

Notwithstanding any other provision to the contrary, any person who is employed to teach adult or community college classes for not more than 60 percent of the hours per week considered a full-time assignment for regular employees having comparable duties shall be classified as a temporary employee, and shall not become a contract employee under the provisions of Section 87604 [13446].

STATEMENT OF THE CASE

The individual persons represented by Petitioner[5] before this Court are temporary part-time teachers and members of petitioner Federation who were initially hired after November 8, 1967[6] by the Peralta Community College

[5]Hereinafter collectively referred to as the "temporary part-time teachers" or the "temporaries."

[6]The effective date of the last paragraph of § 87482 [13337.5].

District, a local governmental entity which operates five community colleges in Alameda and Plumas Counties, California pursuant to an elaborate body of California statutes which determine the structure, program, employment requirements, and general governance of such districts.

The temporary part-time teachers all work for "not more than 60 percent of the hours per week considered a full-time assignment for regular employees having comparable duties" and therefore, pursuant to the last paragraph of § 87482 [13337.5] and the California Supreme Court's decision in this case (Appendix to Petition, at p. 14), must be *initially* classified as temporary employees. They are *not* prohibited from advancing to a more permanent status (i.e., as "contract" [probationary] or "regular" [tenured] employees) and the California Supreme Court specifically found that § 87482 [13337.5] does "not . . . preclude an otherwise authorized *subsequent* change from temporary status." (See Appendix to Petition, at p. 14.)[7] As temporary employees they were specifically excluded from the provisions of former Education Code § 13503.1 which mandated pro rata pay for part-time regular and contract employees.[8] Thus, subject to the collective bargaining proce-

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[7]Petitioner's unqualified assertion (Petition, at p. 6) that temporary part-time teachers are forever barred from attaining tenured status as community college teachers is curious considering the quoted language of the California Supreme Court. The California Supreme Court's interpretation of the last paragraph of § 87482 [13337.5] is that it merely requires the *initial* classification of 60%-and-under part-time instructors as temporary employees and does not preclude their *subsequent* change from temporary status.

[8]Section 13503.1 was omitted from the statutory provisions governing community college districts in the reorganized Education Code. Former § 13503.1 provided, in relevant part:

". . . In fixing the compensation of part-time employees, governing boards shall provide an amount which bears the same

dure of the Educational Employment Relations Act,[9] California community college districts have virtually unlimited authority to establish pay scales for temporary certificated personnel, which pay scales need bear no relation to pay scales for other certificated employees or classified (i.e., non-professional) employees. Temporary part-time teachers as found by the trial court below (see Appendix to Petition, at p. 69) ". . . can be removed without notice, cause or hearing," and, of course, need not be rehired by a district at the end of their employment contracts.[10] Normally, employment as a "contract" teacher leads to tenured employment as a "regular" teacher, which employment cannot be terminated by a community college district absent good cause.

In 1974, several persons (including the Federation) brought this suit, charging, *inter alia*, first that the statutory scheme of which § 87482 [13337.5] was a part did not prevent 60%-or-under temporary teachers from achieving contract or regular status (and thus to be denied tenure

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ratio to the amount provided full-time employees as the time actually served by full-time employees of the same grade or assignment. This section shall not apply to any person classified as a temporary employee under Section . . . 13337.5 . . . ."

The statutory provision now applicable to temporary certificated employees salary is § 87804 [13508]:

"The governing board of a community college district may employ such temporary employees of the district as it deems necessary and shall adopt and make public a salary schedule setting the daily or pay period rate or rates for temporary employees. . . ."

[9]California Government Code §§ 3540 *et seq.* (not applicable in the instant case).

[10]Part-time regular and contract teachers would normally be persons employed for more than 60% of the number of hours considered a full-time load. Such teachers have tenure and pro rata pay rights analogous to those of their full-time counterparts.

and equal pay), and second that if the statute did so provide, it would violate the equal protection clause of the Fourteenth Amendment.[11]

Although the trial court upheld Petitioner's claim regarding tenured status, it expressly rejected Petitioner's equal protection argument with respect to pro rata pay (Appendix to Petition, at pp. 71 and 77) and based the partial grant of relief upon a statutory interpretation which the California appellate courts were to reject.

The California Court of Appeals described the trial court proceedings in the following passage adopted by the Supreme Court in its opinion:

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[11]In the initial petition to the Alameda County Superior Court it was alleged:

> "XII. The establishment of a classification of hourly or part-time employees paid at less than pro rata rates is arbitrary and unreasonable.
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> • • •
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> "XIV. The compensation of hourly part-time employees at a rate of pay which is not a pro rata rate of pay when compared with the contract employees is a denial of the equal protection of laws guaranteed under the United States and California Constitutions. (Reporter's Transcript, pp. 5-6)."

This petition was subsequently amended by the addition of a Second Cause of Action which, in part, stated:

> "II. The [various petitioners] have been denied the statutory protection of the Education Code and the *due process* clauses of the United States and California Constitutions, in that the practice of perpetuating persons on a part-time-hourly basis denies those persons the benefit of the Teacher Tenure Laws of the Education Code of the State of California. . . ." (Reporters Transcript, p. 165) [emphasis added]

This latter allegation is not relevant to the instant Petitioner inasmuch as the statutory scheme at issue is attacked on *equal protection* grounds only. References to due process in the Petition relate solely to: (1) potential issues which Petitioner admits it has no standing to raise and (2) Petitioner's contention that temporary part-time teachers have an independent right to procedural due process in the absence of pre-existing property rights.

> "Twelve teachers who have been employed by Peralta Community College District (supported by plaintiff federation of which they are members) sought writ of mandate to compel the district and its governing board to grant them tenured status and to compensate them at a certain rate of pay. The trial court granted the writ to classify some of the teachers as permanent and others as contract employees, but denied the petition as it relates to pay. The district appeals from that portion of the judgment which has to do with classification and the teachers cross-appeal from the part which concerns compensation."
>
> (Appendix to Petition, at p. 4.)

In accordance with another California Supreme Court case involving the same statute, as well as the same defendant (then known by a slightly different name), *Balen v. Peralta Junior College District*, 11 Cal.3d 821, 114 Cal. Rptr. 589, 523 P.2d 629 (1974), the California Supreme Court held in its opinion below that those part-time teachers who had been hired before a 1967 amendment to § 87482 [13337.5] had already attained non-temporary status, and therefore that the statute—which the California Supreme Court had concluded in *Balen* was not intended to be retroactive—did not alter this. Affirming the Court of Appeal's decision, the Court reversed that part of the trial court's decision that ordered the district to classify as contract or regular the temporary part-time teachers employed after November 8, 1967, the effective date of the statutory change.[12] (Appendix to Petition at pp. 25 and 60.)

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[12]The last paragraph of § 87482 [13337.5] was interpreted by the California Supreme Court as imposing only two restrictions on part-time teacher classification. The first, that the teacher "shall be classified as a temporary employee" was construed by the Court to "apply

As recognized by the Petitioner (Petition, at p. 11), "[n]either the California Court of Appeal nor the Supreme Court of California adverted to the constitutional claim in their opinions." It could not have been otherwise since the "constitutional claim" which petitioner now seeks to raise was never properly before these Courts. Petitioner's claim that it has preserved *the* constitutional issue which it now seeks to have heard by this Court by urging an equal protection claim in its brief before the California Court of Appeal is totally without merit.

In its arguments to both the California Court of Appeal and the California Supreme Court Petitioner presented its case almost exclusively on the basis of statutory interpretation, which interpretation was rejected by both Courts. The Petitioner contended that, under its interpretation of the relevant sections of the California Education Code, its members were statutorily entitled to non-temporary status (i.e., "contract" or "regular" status, depending upon their length of service with the District) and that *as* contract or regular employees they have a constitutional right to pro rata pay. When the California Court of Appeal and Supreme Court both concluded that the part-time teachers were properly classified as "temporary" under the applicable California statutes their labors were at an end.

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only to *initial* classification and not to preclude an otherwise authorized *subsequent* change from temporary status." Appendix, *infra*, at p. 14 (original emphasis). The second limitation, that the part-time employee not be classified as probationary "under the provisions of Section 13446" eliminated only one possible alternate basis for subsequent reclassification.

However, the Court went on to examine other statutes which arguably mandated subsequent reclassification of a part-time teacher initially classified as temporary pursuant to § 87482 [13337.5], only to conclude "we find no such statute." Appendix to Petition, at pp. 14-15.

Neither Court ever reached any constitutional issue because, as posed to them by petitioner,[13] the constitutional issue was inextricably linked to a statutory determination that the part-time teachers before the courts were not "temporary" employees. When the California Supreme Court decided that the part-time teachers were "temporary" employees the only constitutional issue before it became moot.

When Petitioner belatedly recognized its restricted framing of the constitutional issue on appeal it sought a rehearing in the California Supreme Court. Its Petition for Rehearing was denied without opinion on July 6, 1979.

REASONS WHY THE WRIT SHOULD BE DENIED

I

SUMMARY OF ARGUMENT

This Court does not have jurisdiction under 28 U.S.C. § 1257(3) on account of the fact that the constitutional issues which Petitioner now seeks to have heard were not properly presented to the California courts. While admitting, *arguendo*, that some constitutional issue or issues were raised in the trial court, an examination of the record below clearly shows that such issue or issues were not preserved in the California appellate courts and were not decided or addressed in the opinions of either the California Court of Appeal or the California Supreme Court.

Respondent's argument shows that the only constitutional issue presented to the California appellate courts

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[13]As shown more fully below, the petitioner affirmatively disclaimed the very constitutional equal protection issue it now seeks to resurrect.

was a claim that under the equal protection clause non-temporary part-time teachers have a right to pro rata pay. When the California appellate courts construed the applicable statutory provisions and determined that the proper status of the teachers before the bench was in fact temporary, the constitutional question as presented to the courts simply became moot, and therefore was not addressed.

It was not until after the decision of the California Supreme Court was filed and published that the Petitioner recognized the fact that the broad constitutional issues which it now seeks to have heard had not been presented to the California appellate courts. A Petition for Rehearing was filed in the California Supreme Court which sought to address these issues, but under controlling California law, the attempt to belatedly raise such issues was untimely. The Petition for Rehearing was denied without opinion.

This Court has clearly stated on numerous occasions that a petition for a writ of certiorari to a state court will not be granted where the federal or constitutional issues sought to be addressed were not first raised, preserved and decided by the state courts below. This is a jurisdictional requirement under 28 U.S.C. § 1257(3). On this ground alone the Petition should be denied.

Furthermore, Petitioner has failed to present a *prima facie* case of any constitutional violation. This statutory classification does not violate the equal protection clause as it bears a rational relationship to permissible governmental objectives. The standard of strict scrutiny does not apply as temporary part-time teachers are not a suspect

class, nor does the statutory scheme limit the exercise of any fundamental constitutional rights. Moreover, any contention that temporary part-time teachers have been denied the benefits of substantive or procedural due process must fail because none have been deprived of life, liberty or property.

Neither tenure nor pro rata pay amounts to a fundamental right of constitutional dimensions. There is no constitutional right to governmental employment *per se,* and the due process protections relating to tenure come into operation only where tenure has already been earned. There is no independent right to the accompanying due process protections in the absence of tenure itself.

Petitioner further alleges a possible chilling effect upon First Amendment rights to freedom of speech. However, it has alleged no specific conduct in which its members wish to engage which would be circumscribed by the statutory scheme at issue. As there is also no allegation that the statutory scheme has been applied to any temporary part-time teacher with the effect of limiting free speech, no chilling of First Amendment freedoms has been established.

II

THE COURT DOES NOT HAVE JURISDICTION UNDER 28 U.S.C. § 1257(3)

A. The Petitioner Failed to Argue the Points It Now Seeks to Raise Before Either the California Court of Appeal or the California Supreme Court

1. Petitioner's Equal Protection Claim Was Predicated Upon Its Claim to Tenured Status for Its Temporary Teachers

Jurisdiction to grant the Petition for Certiorari and review the decision below is based upon Petitioner's assertion that plaintiffs below[14] presented *and* preserved an equal protection claim which the California Supreme Court, in its opinion of May 25, 1979, improperly failed to address. An examination of the record in this case and the several briefs filed by plaintiffs below clearly shows that this assertion is without merit. The only constitutional claim made by plaintiffs in their appeal was that under California law they had achieved regular or contract status and therefore *as* regular or contract instructors they had a constitutional right to be paid on a pro rata basis with their full-time counterparts. No equal protection claim with regard to *non-tenured* part-time instructors was ever raised or argued on appeal prior to the Petition for Rehearing to the California Supreme Court which was denied without opinion. Further, as will be shown below, the plaintiffs clearly disclaimed the issue they now seek to raise at the appellate level.

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[14]Petitioner herein was one of the plaintiffs before the California courts. For convenience, this portion of the Brief in Opposition will use the designation "plaintiffs" to refer to the parties aligned with Petitioner who were before the California courts.

Throughout the appellate process, plaintiffs at all times linked their constitutional equal protection claim of entitlement to pro rata pay with their statutory claim to contract or regular status under § 87482 [13337.5]. Plaintiffs admitted that the broad equal protection issue which they now seek to raise "was not briefed or discussed in the petition for hearing before [the California Supreme] Court" but assert that this claim was somehow raised *and* preserved, and was therefore before the Courts (Petition for Rehearing to California Supreme Court, p. 2). Admitting *arguendo* that an equal protection claim regarding *all* part-time faculty was raised before the Alameda County Superior Court, as shown below, it was nowhere preserved on appeal.

2. Proceedings Before the California Court of Appeal

In their Petition for Rehearing to the California Supreme Court (at pp. 3-4) plaintiffs asserted that such issue was raised before the Court of Appeal in their "Opening Brief of Cross-Appellants" at pp. 36-38,[15] and later in their Closing Brief at some undisclosed location. A reading of the briefs indicate that no such issue was ever before the Court of Appeal and certainly could not have been preserved for hearing by the California Supreme Court or this Court.

(a) The Constitutional Claim on Appeal for Pro Rata Pay Was for Non-Temporary Staff Only

Throughout their appeal, the plaintiffs argued that, under this interpretation of § 87482 [13337.5], they are

[15]Petitioner also references this passage in its Petition to this Court, at pp. 11-12.

"tenured" employees and that as a necessary consequence of such tenured status they are entitled to receive pro rata pay.[16] In the Opening Brief of Cross-Appellants (at pp. 30-31) they stated:

> "While finding that Petitioners [i.e., plaintiffs] had received tenure on a part-time basis, the trial court inconsistently found they were not entitled to pro rata pay. *This portion of the brief shows that the necessary consequence of tenuring is pro rata pay* and that any other result contravenes the District's own salary schedule, and the legislative purpose, and is suspect under the United States and California Constitutions.
>
> • • •
>
> "The defect in the findings of the trial court upholding this scheme is that the findings were aimed solely at distinguishing between the compensation which a Dis-

[16]In their Opening Brief plaintiffs stated the "Nature of the Case" to the Court of Appeal as follows:

> "This matter is here on an appeal and cross-appeal from a Superior Court judgment in part granting and in part denying a Petition for Writ of Mandate filed by several Peralta Community College District employees and employee organizations (hereinafter "Petitioners").
>
> "The *appeal* raises issues regarding the tenure rights of a certain class of part-time Community College District teachers, and the *cross-appeal* raises issues regarding the appropriate rate of pay such teachers are to receive.
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> " • • •
>
> "While granting relief on the 'tenure cause of action' the trial court declined to grant these same Petitioners pay pro rata with that of tenured employees. *Petitioners* filed a Cross-Appeal from that portion of the judgment which failed to accord them pro rata pay and *argue here that* the District's salary schedule, by which it is bound, and the statutory scheme are such that *once an employee is tenured as to a part-time position the automatic consequence is a right to pro rata pay.* Not only is this result mandated by the schedule and by Education Code § 13503.1, but *any other construction would raise serious constitutional problems.*" (Opening Brief of Cross-Appellants and Reply Brief of Respondents, pp. 1-2.) [Emphasis added.]

> trict might rationally pay true temporaries as opposed to what it must pay contract or regular employees. The findings fail, however, to address themselves to *the question of the compensation which is due those part-time instructors who*, by virtue of the principles enunciated in the court's other findings, *cease to be temporary*. Are they to be consigned to the anomalous position of tenured teachers paid at temporary rates, or are they to be paid the pro rata equivalent of full-time teachers? *This is the question* addressed in this portion of this brief." [Emphasis added.]

Immediately following this statement of the issue on their cross-appeal, the plaintiffs' main argument is stated as follows: "(A) Under The Statute Pro Rata Pay Automatically Follows From Tenure" (at p. 31).

The final argument in the plaintiffs' Opening Brief is set forth as follows: "(C) Any Construction Which Permits Tenured Part-Timers To Receive Less Than Pro Rata Pay Would Be Inconsistent With The Legislative Intent And Arbitrary." (At p. 34.) Subsumed within this argument are the only portions of plaintiffs' appellate briefs which are specifically referenced in support of their Petition for Rehearing to the California Supreme Court and (on this issue) in their Petition to this Court. On page 36 of their Opening Brief to the California Court of Appeal plaintiffs maintained that: "[t]he District's refusal to provide pro rata pay to all part-time persons is irrational; it creates a classification that bears no rational relationship to the statutory function." Directly thereafter, however, the plaintiffs specifically denominate the classification referred to as "the temporary classification." The plaintiffs then go on (at pp. 37-38) to list the qualifica-

tions of a number of individual plaintiffs and complain that "all of these individuals are refused pay on a pro rata basis simply because the District, in the absence of any statutory authority chooses to classify them as 'part-time temporary' employees. . . ."

Thus in their Opening Brief to the California Court of Appeal, the plaintiffs asserted a claim that they are entitled to pro rata pay *not* because they are part-time teachers *per se,* but rather because they are improperly classified as *temporary* teachers while they should have been classified in a contract or regular status and as such should be entitled to pro rata pay. In this, and in all subsequent briefs prior to their Petition for Rehearing to the California Supreme Court, plaintiffs have never asserted that all part-time faculty are entitled to pro rata pay, but rather have maintained that, under their interpretation of § 87482 [13337.5], they should be classified as part-time permanent faculty with tenure rights and, because of their non-temporary status, a constitutional entitlement to pro rata pay obtains.

(b) Plaintiffs Affirmatively Disclaimed the Very Claim They Now Seek to Raise

In their "Closing Brief of Cross-Appellants" to the California Court of Appeal the plaintiffs affirmatively disclaimed the claim which they now seek to assert. In that brief, plaintiffs focused the issues before the appellate courts as follows:

> "(1) These Petitioners do not ask all, or any temporary teachers be paid on a pro rata basis. *They ask only that contract and regular teachers who are part-time receive such pro rata pay . . . .*

> (2) This litigation does not involve all of the District's teachers which it has treated as temporary; rather, *the litigation involves only that portion of those teachers who have achieved contract or regular status.* . . ." (Closing Brief of Cross-Appellants, pp. 2-3) [Emphasis added.]

Later in this Brief, the plaintiffs state:

> *"The teachers before this Court are part-time contract and regular teachers,* and must be paid under the District's own schedule for contract and regular teachers." (Closing Brief of Cross-Appellants, p. 6)

Thus the plaintiffs framed the issue for the California Court of Appeal in such a manner as to abandon any claim that a person properly classified as temporary would be entitled to pro rata pay. Their assertion of a right to pro rata pay has always been conditioned upon their claimed status as non-temporary employees. When the California Court of Appeal found that part-time teachers hired pursuant to the provisions of the fourth paragraph of § 87482 [13337.5] are temporary employees, no further issue, constitutional or otherwise, was before that Court with regard to such employees' entitlement to pro rata pay under the issues on appeal as set forth by the plaintiffs herein.

In the Court of Appeals' decision in this case (originally reported at 69 Cal.App.3d 281, 138 Cal.Rptr. 144 [1977]), the Court concluded that former Education Code § 13503.1 requires pro rata pay for part-time *regular,* or *contract* teachers (in accordance with the contentions made by the plaintiffs in their appellate briefs) but that under § 87482 [13337.5] part-time teachers hired after November 8, 1967 did not advance to regular or contract status. The

Court of Appeal never reached the broad equal protection issue raised in the Petition for Rehearing to the California Supreme Court (and in the Petition for a Writ of Certiorari) concerning the entitlement of *all* part-time teachers to pro rata pay simply because that issue was not raised, briefed or argued on appeal.

3. The Petition for Rehearing to the Court of Appeal Never Addressed Equal Protection Arguments

Subsequent to the Court of Appeals' decision of April 25, 1977, the plaintiffs petitioned that Court for a rehearing. Their moving papers were entitled "Petition for Rehearing on Post-1967 Tenure." This Petition did not address the Court of Appeals' failure to reach the equal protection issue raised for the first time in the Petition for Rehearing to the California Supreme Court, but rather, sought a rehearing solely on (1) the question of statutory interpretation of § 87482 [13337.5] and (2) the effects of *Balen v. Peralta Junior College District, supra,* and *Ferner v. Harris,* 45 Cal.App.3d 363, 119 Cal.Rptr. 385 (1975) on this case. Nowhere in that Petition was the equal protection argument raised. Further, the prayer was "that a rehearing be had on [the two] points specified herein." (Petition for Rehearing on Post-1967 Tenure, p. 20).[17]

[17]It is inconceivable that plaintiffs could have failed to note that the California Court of Appeal totally omitted their supposed constitutional claim as to *temporary* teachers from its opinion if, in fact, they were asserting such a constitutional claim. The omission of this matter as a ground for rehearing can only be interpreted as conclusive proof that no broad constitutional claim (such as Petitioner now seeks to raise) was being asserted to the California appellate courts prior to the Petition for Rehearing to the California Supreme Court.

4. Proceedings Before the California Supreme Court Were Limited to Petitioners' Status Under § 87482 [13337.5] and Their Rights If Found to Be Permanent Employees

Following the Court of Appeals' denial of their Petition for Rehearing, the plaintiffs filed a Petition for Hearing in the California Supreme Court. In their Petition for Hearing, the plaintiffs stated:

> *"The sole issue raised by this Petition is whether the fourth (last) paragraph of Education Code § 13337.5 when adopted in 1967 created a class of permanently temporary community college teachers,* that is, teachers who may never achieve probationary (contract) or permanent (regular) status, although they are hired and rehired repeatedly and continuously over a period of many years." (Petition for Hearing, p. 2) [Emphasis added.]

An examination of their Petition for Hearing clearly shows that the issue brought by plaintiffs to the California Supreme Court is the same basic issue which was before the California Court of Appeals, viz: whether § 87482 [13337.5] authorizes community college districts to hire and maintain 60%-and-below part-time faculty as temporary employees, and the entitlement to pro rata pay for those part-time employees if they should be found to be contract or regular employees. Throughout their appeals in this case, the plaintiffs have always linked their claim of entitlement to pro rata pay to their claim that their employment status is other than temporary and have based their claim to non-temporary status on statutory rather than constitutional grounds. In determining that those per-

sons employed after the effective date of § 87482 [13337.5] are temporary employees neither the California Court of Appeal nor the California Supreme Court ever reached any constitutional issue since no such issue was ever raised on appeal by plaintiffs prior to their Petition for Rehearing to the California Supreme Court.

B. Under California Law a Rehearing Will Not Be Granted on Points Newly Raised

When the equal protection claim was presented to the California Supreme Court by way of a Petition for Rehearing, that Court properly denied the request to hear the newly discovered argument.

Witkin states the fundamental prohibition against raising new points on rehearing as follows:

> "The courts have on numerous occasions declared that they will not grant rehearings on points newly urged in the petition. It is the duty of counsel to see that all points are properly presented in the original briefs or argument, before submission. (*Pac. Finance Corp. v. Lynwood* (1931) 114 C.A. 509, 516, 300 P. 50, 1 P.2d 520 [quoting early case referring to this "most pernicious practice"]; *Prince v. Hill* (1915) 170 C. 193, 195, 149 P. 578; *Estate of Novotny* (1928) 94 C.A. 782, 790, 271 P. 923, 271 P. 58; *Mann v. Brison* (1932) 120 C.A. 450, 452, 7 P.2d 1110, 9 P.2d 257; *Estate of Edwards* (1932) 126 C.A. 152, 157, 14 P.2d 318, 15 P.2d 194; *Conner v. East Bay Mun. Utility Dist.* (1935) 8 C.A.2d 613, 619, 49 P.2d 982; *Estabrook Co. v. Ind. Acc. Com.* (1918) 177 C. 767, 771, 177 P. 848; *Ocean Park etc. Corp. v. Santa Monica* (1940) 40 C.A.2d 76, 87, 104 P.2d 668, 879; *Epperson v. Rosemond* (1950) 100 C.A.2d 344, 347, 223 P.2d 655, 224 P.2d 480 ["Appellants where they

> blew very hot in their briefs blow very cold indeed in their petition for rehearing"]; *Smith v. Crocker First Nat. Bank* (1957) 152 C.A.2d 832, 836, 314 P.2d 237; *People v. Mascotti* (1962) 206 C.A.2d 772, 779, 23 C.R. 846; see 5 Am.Jur.2d 412);" Witkin, *California Procedure, 2d Ed.* (1971) Appeal § 598.

The prohibition against raising new points on a petition for rehearing has been the California rule from the earliest possible time:

> "It was intimated by the Court on the argument, that on a rehearing the whole cause was open and either party might raise such objections and make such points, as he could have raised and made on the first argument. On reflection we think otherwise. A party should present his whole case on the first hearing, and ought not to be permitted to argue it by piece-meal. This is the practice in Louisiana, [citation] and, as a general rule, we approve of it." *Grogan v. Ruckle,* 1 Cal. 193, 197 (1850).

The California appellate courts have consistently refused to hear points on rehearing which were not presented at the earlier stages of the appellate process.[18]

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[18]*Kellogg v. Cochran,* 87 Cal. 192, 200, 25 P. 677 (1890) [". . . we will not grant a rehearing in order to consider points not made in the argument upon which the case was originally submitted . . . we cannot be expected to scrutinize the record for the purpose of discovering points which counsel have not taken the trouble to specify"]; *Dougherty v. Henarie,* 49 Cal. 686 (1875) ["The proper dispatch of the business of the Court requires that counsel should state the grounds on which they rely in their briefs, and not reserve other points to be set up in a petition for rehearing, after a decision of all the cause."]; *City of San Marino v. Roman Catholic Archbishop,* 180 Cal.App.2d 657, 679, 4 Cal.Rptr. 547 (1960) ["This point, not having been raised or argued in the City's opening or closing briefs or on oral argument, may not be considered on a petition for rehearing."]; *Blackman v. MacCoy,* 169 Cal.App.2d 873, 882, 338 P.2d 234 (1959) ["This contention was not set forth by appellant in his

Thus, where the plaintiffs failed to raise the issue of equal protection vis-a-vis part-time *temporary* employees before either the California Court of Appeal or the California Supreme Court until their final Petition for Rehearing, the California Supreme Court properly denied a rehearing on such issue.[19]

C. This Court Has No Jurisdiction to Decide Federal Constitutional Issues Which Were Not Raised and Decided in the California Appellate Courts

Few propositions of law are more clear than the well-established jurisdictional rule that in cases arising in the state courts the U.S. Supreme Court can only review federal constitutional issues which were raised, preserved and decided below. In *Cardinale v. Louisiana*, 394 U.S. 437, 438-9, 22 L.Ed.2d 398, 89 S.Ct. 1161 (1969) the Court stated:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the

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briefs nor in oral argument, and will not be considered for the first time on a petition for rehearing"]; *City and County of San Francisco v. Pacific Bank*, 89 Cal. 23, 25, 26 P. 615 (1891) ["when counsel have once argued and submitted a cause for the decision of the court, it must be assumed that they have presented all the reasons upon which they rely for an affirmance or a reversal of the judgment. The court will not consider a petition for rehearing that attempts to discuss the case upon grounds which were not presented in the original argument or discussed in its opinion. (*Kellogg v. Cochran*, 87 Cal. 192)"]; *Pasadena Ice Company v. Reeder*, 206 Cal. 697, 705, 275 P. 944 (1929) ["The scope of such injunction was not brought into question upon this appeal until the presentation of the petition for rehearing and will not for that reason be given consideration thereof."]

[19]This was especially true in the instant case wherein, as shown above, the plaintiffs specifically tailored their presentation of issues on appeal to affirmatively exclude the very argument that they now seek to raise.

first time on review of state court decisions. In *Crowell v. Randell*, 10 Pet 368, 9 L.Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344, 3 L.Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, § 25, 1 Stat 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet 368, 391, 9 L.Ed. 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, *Miller v. Nicholls*, 4 Wheat 311, 315, 4 L.Ed. 578, 579 (1819), and since, e.g., *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc.*, 360 U.S. 334, 342, n. 7, 3 L.Ed.2d 1280, 1286, 79 S.Ct. 1196 (1959); *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160-163, 89 L.Ed. 812, 817-819, 65 S.Ct. 573 (1945); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435, 84 L.Ed. 849, 851-852, 60 S.Ct. 670 (1940); *Whitney v. California*, 274 U.S. 357, 362-363, 71 L.Ed. 1095, 1100-1101, 47 S.Ct. 641 (1927); *Dewey v. Des Moines*, 173 U.S. 193, 197-201, 43 L.Ed. 665, 667-668, 19 S.Ct. 379 (1899); *Murdock v. City of Memphis*, 20 Wall 590, 22 L.Ed. 429 (1875).

"In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. . . . [i]n a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state

ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio*, 385 U.S. 92, 17 L.Ed.2d 189, 87 S.Ct. 252 (1966), they should be given the first opportunity to consider them."

And in *McGoldrick v. Compagnie Generale Transatlantique, supra,* the Court stated:

"But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the Federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220, 225, 72 L.Ed. 249, 252, 48 S.Ct. 87 [1927]: *Duignan v. United States*, 274 U.S. 195, 200, 71 L.Ed. 996, 1000, 47 S.Ct. 566 [1927]. In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court. *Dewey v. Des Moines*, 173 U.S. 193, 43 L.Ed. 665, 19 S.Ct. 379 [1899]; *Keokuk &*

H. Bridge Co. v. Illinois, 175 U.S. 626, 633, 44 L.Ed. 299, 302, 20 S.Ct. 205 [1900]; *Whitney v. California*, 274 U.S. 357, 362, 363, 71 L.Ed. 1095, 1100, 1101, 47 S.Ct. 641 [1927]; *New York ex rel. Conn v. Graves*, 300 U.S. 308, 317, 81 L.Ed. 666, 672, 57 S.Ct. 466, 108 ALR 721 [1937].

"Like considerations, we think, require us to refuse to entertain such new grounds of attack as a support for a state judgment of invalidity based on an erroneous construction of the Constitution. In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented. Similarly their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suitors have failed to urge before them, *or which, in the course of proceedings there, have been abandoned.*" (309 U.S. at 434-5.) [Emphasis added.]

As shown above, the only constitutional issue which was presented to the California appellate courts was whether, based upon the equal protection clause, part-time regular and contract teachers are entitled to be compensated on a pro rata basis proportionate to the amounts paid full-time employees. Even that issue was never reached by either the California Court of Appeal or the California Supreme Court on account of the fact that former Education Code § 13503.1 was dispositive of the issue (see Appendix to Petition, at pp. 56 and 21-22, respectively). Both California appellate courts apparently took plaintiffs at

their word that they were not making an equal protection claim on behalf of temporary part-time instructors.[20]

Subsequent to the decision of the California Supreme Court plaintiffs employed new counsel who attempted to raise the broad constitutional equal protection issue as to temporary employees. As shown above, this was too late under California law and likewise will not support this Court's jurisdiction under 28 U.S.C. § 1257(3). The situation here is analogous to *Herndon v. Georgia*, 295 U.S. 441, 79 L.Ed. 1530, 55 S.Ct. 794 (1935), wherein the Court stated:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule [21] is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. *Texas & P. R. Co. v. Southern P. Co.*, 137 U.S. 48, 54, 34 L.Ed. 614, 617, 11 S.Ct. 10 [1890]; *Loeber v. Schroe-*

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[20] "It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature." *Keokuk & Hamilton Bridge Co. v. Illinois, supra,* 175 U.S. at 634.

[21] The exception to this rule wherein an issue may first be raised on petition for rehearing when the court gives a statute an unanticipated new construction is obviously not applicable in the instant case. The basic statutory question at issue in this case (i.e., whether the fourth paragraph of § 87482 [13337.5] could be read independently or whether it could only be read in conjunction with the first three paragraphs of the section) had been warmly litigated throughout the State for several years by the two major California teachers organizations (of which Petitioner is an affiliate) opposing numerous local community college districts. The preceding litigation had provided no definitive answer from either the Superior Courts or the Courts of Appeal and *Peralta* was the first case to reach the California Supreme Court. The construction placed upon § 87482 [13337.5] by the California Supreme Court can in no way be said to have been unanticipated by the parties to this litigation. (Cf., *Herndon v. Georgia, supra* at 443-4.)

der, 149 U.S. 580, 585, 37 L.Ed. 856, 858, 13 S.Ct. 934 [1893]; *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181, 64 L.Ed. 213, 214, 40 S.Ct. 116 [1919]; *Rooker v. Fidelity Trust Co.*, 261 U.S. 114, 117, 67 L.Ed. 556, 563, 43 S.Ct. 288 [1923]; *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 454, 455, 68 L.Ed. 382, 387, 388, 44 S.Ct. 197 [1924], and cases cited." (295 U.S. at 443)

Since the California Supreme Court denied the Petition for Rehearing without opinion, the constitutional issues which petitioner now seeks to raise were never properly presented, and certainly were not decided below and this Court's jurisdiction fails.[22]

III

PETITIONER'S CONSTITUTIONAL CLAIMS ARE WITHOUT MERIT AS PRESENTED AND THEREFORE NEED NOT BE CONSIDERED FURTHER

Petitioner has failed to present a prima facie case of any constitutional violation. Rather, it has attempted to support its position with a collection of favorable language selected from cases involving three very different varieties of constitutional claims: equal protection, procedural due process, and substantive due process. In so doing, Petitioner has not met the standards of a prima facie case under any one of these theories. Any equal protection argument must fail because the standard of minimal rationality has not been met and temporary part-time teachers are not a suspect class entitled to a higher standard of equal protection scrutiny. Petitioner admits that it has not established a claim under procedural due process requirements as no

[22]See also *Pim v. St. Louis*, 165 U.S. 273, 274, 41 L.Ed. 714, 17 S.Ct. 322 (1897).

one has suffered a deprivation of any interest protected by the due process clause. Nevertheless, its Petition relies extensively on standards extracted from procedural due process cases. Finally, Petitioner presents no valid claim under substantive due process requirements as no "fundamental right" is limited by the statutory scheme. Thus, Petitioner has not set out the elements of a prima facie case under any constitutional provision.

A. The Statutory Provisions In Question Do Not Deny Equal Protection Of The Laws

Petitioner's basic claim seems to be that the statutory provisions excluding temporary part-time teachers from tenure and pro rata pay violates the Equal Protection Clause of the Fourteenth Amendment. Equal protection guarantees that similarly situated individuals will be treated similarly, thus testing whether a legislative classification is properly drawn. This court has traditionally deferred as much as possible to legislatures in the establishment of proper lines for statutory classification. For the most part, review has been limited to a minimal standard of some conceivable rational relationship between the statutory provision and the governmental interest to be served. The standard for judging legislative classification is more demanding only where the classification itself involves some suspect criterion such as race or where the classification impinges on individuals in their exercise of fundamental constitutional rights.

1. Basic Standards For Equal Protection

The standards for judicial review of a legislative classification are either a "rational basis" test used for classifica-

tions employed in economic and general social welfare legislation or "strict scrutiny" of classifications touching upon fundamental constitutional values or employing unconstitutional criteria. Under the rational basis test a classification is valid if it is shown to conceivably bear a rational relationship to a governmental interest and not be prohibited by the constitution. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 55, 36 L.Ed.2d 16, 93 S.Ct. 1278, (1973) reh. den. 411 U.S. 959, 36 L.Ed.2d 418, 93 S.Ct. 1919 (1973). Under strict scrutiny the classification must be necessary to a compelling state interest for the statute to be upheld. *Loving v. Virginia*, 388 U.S. 1, 11, 18 L.Ed.2d 1010, 87 S.Ct. 1817, (1967). Strict scrutiny applies only in two categories of cases: first, where the classification controls the exercise of a fundamental constitutional right; second, where the classification distinguishes between persons on a suspect basis. Virtually all other classifications are judged on the rational basis standard. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 311-314, 49 L.Ed.2d 520, 96 S.Ct. 2562, (1976). As Petitioner does not allege that this case involves a suspect classification, and since no fundamental right is infringed by the statutory scheme, the rational basis standard of review must be applied.

As long as the legislature does not employ suspect criteria or burden fundamental rights, this Court has historically given great weight to legislative judgments concerning the terms of public employment, as part of a general policy of deferring to legislative judgments as to matters of economic and social welfare. Thus, this Court has upheld mandatory retirement from government service at age 50, ruling that classifications by age are not "suspect" or

of constitutional significance. *Massachusetts Board of Retirement v. Murgia, supra* at 313-314. Similarly, government employees may be classified in ways that could not be applied to the public generally such as on the basis of appearance or residence. *Kelley v. Johnson*, 425 U.S. 238, 248-249, 47 L.Ed.2d 708, 96 S.Ct. 1440 (1976); *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645, 646, 47 L.Ed.2d 366, 96 S.Ct. 1154 (1976). Regulation of employees must only be reasonably related to the efficient operation of governmental units or the pursuance of other legitimate governmental purposes as there is no fundamental right to governmental employment. *San Antonio Independent School District v. Rodriguez, supra; Dandridge v. Williams*, 397 U.S. 471, 25 L.Ed.2d 491, 90 S.Ct. 1153 (1970), reh. den. 398 U.S. 914, 26 L.Ed.2d 80, 90 S.Ct. 1684 (1970).

2. Temporary Part-Time Teachers Are Not A Suspect Classification Nor Are Their Fundamental Rights Infringed By The Statutory Scheme

Suspect classifications are limited to those based on race, religion, national origin and in certain specialized circumstances, gender and wealth. Obviously, a classification distinguishing between temporary part-time teachers and other teachers does not utilize any suspect criteria on its face and no disparate impact on any suspect class is alleged.

Petitioner seems to contend that tenure itself is a fundamental right requiring the application of strict scrutiny to any classification which denies tenure to some individuals and not to others. This is simply not the case. First of all, this court has specifically held that there is no property interest of constitutional dimension in continued employ-

ment as a teacher unless the individual has tenure or a reasonable expectation of continued employment equivalent to common law tenure. *Board of Regents v. Roth,* 408 U.S. 564, 33 L.Ed.2d 548, 578, 92 S.Ct. 2701 (1972); *Perry v. Sindermann,* 408 U.S. 593, 602, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972). Such common law tenure has never been held to exist in an institution where some teachers hold tenure under a formal system.[23] Moreover, by definition here the temporary, part-time teachers have no reasonable expectation of continued employment (particularly in the more austere post-Proposition 13 era in California). On the contrary, certainty of continuing employment for its members is one of Petitioner's goals in the instant suit.

Petitioner also claims that the procedural due process protections of notice and hearing upon termination are a fundamental constitutional right denied by § 87482 [13337.5] thus requiring the application of strict scrutiny. As will be discussed more fully below, there are no procedural due process rights unless an individual is deprived of life, liberty or property. This court has held that the hope of continuing employment held by a non-tenured teacher hired on a year to year basis is not an interest in property to which procedural due process applies. *Board of Regents v. Roth, supra.* Due process rights do not exist independently of some property right and the temporary part-time teach-

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[23]In the *Sindermann* case, the college in question had no formal tenure process so that the only "tenure" that could be earned was that accrued over a period of time by reason of the development of a reasonable expectancy of continued employment; in other words, a "common law" or "de facto" tenure. The Ninth Circuit Court of Appeals recently reviewed this very issue and concluded that "... the existence of a formal code governing the granting of tenure precludes a reasonable expectation of continued employment absent extraordinary circumstances." *Haimowitz v. University of Nevada,* 579 F.2d 526, 528 (1978).

ers represented by Petitioner here hold no property interest in continued employment.

3. Temporary Part-Time Teachers Do Not Constitute A Class Which Should Be Accorded A Special Standard Of Review Established For Gender Based Classifications

Petitioner attempts to rely upon *Craig v. Boren,* 429 U.S. 190, 50 L.Ed.2d 397, 97 S.Ct. 451, (1976), reh. den. 429 U.S. 1124, 51 L.Ed.2d 574, 97 S.Ct. 1161 (1977) for the proposition that the list of suspect classifications should be expanded to include temporary part-time teachers or at the very least, that an intermediate standard of review should be applied here. In fact, the reasoning of *Craig v. Boren* precludes any such classification as "temporary part-time teachers" from being considered under any standard higher than rational basis.

In *Boren,* examining a statute which distinguished between males and females, the Court relied upon *Reed v. Reed,* 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251, (1971) and its progeny as controlling the standard applicable to gender classifications. *Craig v. Boren, supra* at 199. The reasoning in *Reed* and *Boren* is that while gender might not rise to the level of presumptive irrationality applied to racial classifications, legislatures may not rationally classify individuals based upon assumptions as to the qualities attributable to a particular gender. The decision in *Frontiero v. Richardson,* 411 U.S. 677, 36 L.Ed.2d 583, 93 S.Ct. 1764, (1973), also relied upon by the court in *Boren* rationalized the higher standard applicable to gender classifications by outlining the "long and unfortunate history of sex dis-

crimination" resulting in "gross, stereotyped distinctions between the sexes" and pointing out that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . ." *Frontiero v. Richardson, supra,* at 684-686.

Boren refers to gender distinctions as being "archaic . . . over broad . . . outdated misconceptions" and "(i)n light of the weak congruence between gender and the characteristic or trait that gender purported to represent" the court found the distinction violated the equal protection clause. *Craig v. Boren, supra* at 199. Temporary part-time teachers have not been the victim of historical discrimination nor are the individuals subject to outdated or unfair stereotypes. There is no basis for claiming that the unique intermediate status occupied by gender based classification should be extended to include temporary part-time teachers. Petitioner here cannot establish any basis for the application of a strict scrutiny standard. The proper analysis of the statutory scheme in question is therefore under the minimal rational basis test.

4. The Statutory System Here Need Only Meet The Rational Basis Test

The equal protection case conceptually closest to Petitioner's contentions in the case at bench is *Massachusetts v. Murgia, supra.* In *Murgia,* challenge was brought to a state statutory scheme providing for mandatory retirement of police officers upon their 50th birthday. The Court found it unnecessary to apply a strict scrutiny test citing *San Antonio Independent School District v. Rodrigues, supra,* for

the proposition that equal protection analysis requires strict scrutiny only where the classification interferes with the exercise of a fundamental right or operates to disadvantage a particular suspect class. The Court stated flatly that "[t]his Court's decisions give no support to the proposition that a right of government employment per se is fundamental. [Citations omitted]. Accordingly, we have expressly stated that a standard less than strict scrutiny 'has consistently been applied to state legislation restricting the availability of employment opportunities'." *Massachusetts v. Murgia, supra* at 313.

The Court went on to find that individuals over 50 do not qualify as a suspect to class reasoning that "[w]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment, or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Id.* For the same reasons here, Petitioners have no fundamental constitutional right to a particular job classification, tenure, or pro rata pay. Likewise, persons classified by the number of hours they work, even more than those classified by age, do not fit the traditional criteria for a suspect classification.

The court in *Murgia* then examined the statutory system under the rational basis standard. Petitioner here has alleged that there is a low degree of correlation between the alleged purpose of statute and the legislative distinction drawn. It claims that the "fit" is not close enough and

that this classification is over broad in that it includes some teachers who work year after year in addition to truly temporary employees. Under the rational basis test properly applicable to this statutory scheme, there is no requirement for a close fit between the classification and the statutory purpose. *Murgia* correctly set forth the standards upon which state statutory employment classifications should be judged:

> "We turn then to examine this state classification under the rational-basis standard. This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. *Dandridge v. Williams,* [397 U.S. 471, 25 L.Ed.2d 491, 90 S.Ct. 1153 (1970)]. Such action by a legislature is presumed to be valid. [Fn. om.]
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> * * *
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> "[W]here rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' *Dandridge v. Williams,* 397 U.S. at 485. . . ." (427 U.S. at 314-316).

Applying the rational basis standard, even accepting, *arguendo,* Petitioner's contentions regarding the percentage of temporary part-time teachers in the District who are actually non-permanent this minimal standard is clearly met.

B. The Statutory Provision In Question Bears A Rational Relation To A Permissible Legislative Objective

Justice Clark in his concurring opinion[24] in the California Supreme Court succinctly sets forth the legislative purposes behind § 87482 [13337.5] and the way in which those purposes relate to the classification of employees as temporary or permanent. He points out that the Legislature has authorized several different types of temporary instructor assignments, each subject to its own limitations and procedures for employee advancement to contract status. In the fourth paragraph of § 87482 [13337.5] the California Legislature authorized a particular type of temporary status with but a single limitation. As long as the individual teacher does not exceed the 60 percent limitation the temporary nature of the assignment continues indefinitely. Justice Clark set forth the nature of the important governmental purposes to be served by the statutory scheme as follows:

> "The flexibility provided by such assignments is essential if community colleges are to keep up with the changing needs of their clientele. As found by the trial court in the instant case: 'The District finds it necessary to change course offerings constantly in response to such factors as the general economy. Within the confines of a single school year, it may be necessary to add and delete courses by reason of such changing community demand. The California layoff statutes . . . are inadequate to make these adjustments because such proceedings . . . occur at a time when it is not possible to foresee the specific changes in demand which will occur during the following school year.'

[24]Justice Clark filed a concurring and dissenting opinion. The portions of his opinion cited in this Brief are from the concurring portion thereof.

> "The district has drawn a convincing picture of staff and program inflexibility that would be created by conferring tenure upon large numbers of part-time instructors. Their required annual reemployment would inflexibly commit a large portion of the district's scarce salary funds. The district would then find it difficult or impossible to shift funds to new, higher demand courses." 24 Cal.3d at 390 [fn. 6] (Appendix to Petition, p. 31).

Justice Clark's concurring opinion clearly states the legislative purpose behind § 87482 [13337.5]. Given this purpose, the legislative distinction between part-time teachers under the 60 percent limitation and those over it unquestionably meets the rational basis test. Petitioner even admits that "many of them are, in fact, genuine temporaries, with no settled and reasonable expectation of continuity of employment . . . there are those who we might call 'true temporaries'—those whom the districts have only recently hired and whose employment the districts have no current intent to continue beyond a semester or two." (Petition, p. 15.) Given the standards outlined above for rational basis, the fact that a substantial number of those in the challenged classification are the so-called true temporaries is sufficient to meet the applicable constitutional standards even if some other individuals were also included.

C. Procedural Due Process Rights Are Not Affected By The Statutory Scheme

Petitioner admits that the requirements of procedural due process are not at issue here as none of the Petitioners has lost his or her employment. However, Petitioner apparently contends that should the district decide not to

rehire a temporary teacher, due process would require giving notice and hearing. This is clearly not the case.

This court has considered precisely this issue in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 33 L.Ed. 2d 548, 92 S.Ct. 2701, (1972). The *Roth* case involved the due process requirement applicable to a non-tenured teacher employed for a fixed term of one year and not rehired for the next academic year. The court held that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. . . . [T]he range of interests projected by procedural due process is not infinite." *Board of Regents v. Roth, supra* at 569-570.

The Court went on to hold that if an expectation of employment is to rise to the level of a property interest, the employee must have "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement" which must "stem from an independent source such as state law." *Board of Regents v. Roth, supra* at 577. The court found that in the absence of tenure, a teacher does not have a property interest sufficient to require notice and hearing such as due process would require for tenured professors.

The teacher in *Roth* had pointed out that most of the year-to-year untenured teachers were rehired and, like Petitioner here, had attempted to argue that the *Perry v. Sindermann, supra,* decision requires a due process hearing under such circumstances. The court completely discounted this argument finding that nothing approaching "common law" tenure system exists for teachers in such a posi-

tion. (See, *Board of Regents v. Roth, supra,* at 578 [fn. 16]). Thus, Petitioner's argument that *Perry v. Sindermann* creates some universal constitutional right to the statutory due process hearing provision afforded tenured teachers is without merit. Temporary part-time teachers, far from having a settled legitimate claim of entitlement, have not even a reasonable expectation of continued employment. In fact, obtaining a settled expectation of continued employment for its members is one of Petitioner's basic goals in bringing this suit. (Petition, p. 14.)

Thus, temporary part-time teachers represented by Petitioner have no due process rights at stake at all insofar as none of them have at risk the loss of any liberty or property interest. Petitioner's apparent reasoning that temporary part-time teachers cannot constitutionally be denied a desired property interest (tenure) because, if they were given such an interest, constitutional due process rights would attach, is blatant bootstrapping and logically unsound. Moreover, such a line of reasoning could be applied to any property interest an individual might wish to gain. As the court said in *Roth:* ". . . Procedural protection of property is a safeguard of the security of interests that a person has *already* acquired in specific benefits." 408 U.S. at 576 [emphasis added]. Temporary part-time teachers have no independent due process rights in the absence of recognized property rights to continued employment. Since by definition temporary teachers have no legitimate claim of entitlement from any source to continued employment, the due process clause is in no way violated by excluding them from the statutory provisions regarding notice and hearing upon termination.

D. The Statutory Provisions In Question Do Not Violate The Requirements Of Substantive Due Process Since No Fundamental Right Is Limited

Although Petitioner has not made any specific allegation that substantive due process is violated by this statutory scheme, it has relied upon substantive due process cases for the proposition that fundamental constitutional rights are involved here, thereby requiring additional statutory protection (Petition, p. 17). Petitioner specifically quotes language concerning the definition of a fundamental right from *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603, 17 L.Ed.2d 629, 87 S.Ct. 675, (1967). In *Keyishian*, the court was considering a New York statute making membership in the Communist party prima facie evidence for disqualification of teachers. The Court found portions of the statute void for vagueness and held that public employment may not be conditioned upon the surrender of constitutional rights. Obviously, the reasoning of *Keyishian* has little application of the instant case, for this statute in no way limits the teachers in the exercise of their constitutional rights.

The rights which the Court has recognized as fundamental are those having a value so essential to individual liberty in our society that they justify the Court's close review of the acts of other branches of government. *City of New Orleans v. Dukes,* 427 U.S. 297, 49 L.Ed.2d 511, 96 S.Ct. 2513 (1976). When the government seeks to deprive persons of fundamental rights, it must prove to the court that the law is necessary to promote a compelling and overriding

interest. Where no such right is restricted, the law need only rationally relate to any legitimate state purpose. *Dukes, supra*, at 303.

The statutory scheme in question in no way involves any limitation on the exercise of any fundamental rights. Moreover, Petitioner has not alleged that the statutory scheme has been applied in such a way as to abridge any of its members' fundamental rights. This being the case, the Court should defer to the California Legislature in making its statutory determination. As this Court stated in *City of New Orleans v. Dukes, supra* at 303:

> ". . . [T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines [citation] . . . ."

Likewise, in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487-8, 99 L.Ed. 563, 75 S.Ct. 461 (1955), Justice Douglas wrote:

> "The Oklahoma law may exact a needless wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . .
>
> ". . . We emphasize again what Chief Justice Waite said in *Munn v. State of Illinois*, 94 U.S. 113, 134, 24 L.Ed. 77, 87 [1877]: 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.' "[25]

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[25] (*Williamson* was relied upon for this proposition in *Usery v. Turner Elkhorn Mining*, 428 U.S. 1, 49 L.Ed.2d 752, 96 S.Ct. 2882, (1975).)

Since Petitioner has not established that the statutory scheme in any way limits temporary part-time teachers in the exercise of any fundamental rights, only the rational basis standard is applicable here. As demonstrated in the discussion of the equal protection clause (sections A and B, *supra*) this legislation clearly meets the minimal standard.

Petitioner attempts to raise the spectre of a chilling effect upon free speech by alleging the possibility of arbitrary or retaliatory dismissal. However, there are no allegations that any such dismissal has taken place.[26] The teacher in *Board of Regents v. Roth, supra,* raised an identical argument which was accepted by the Court of Appeals and specifically overturned by this Court. The Court stated in footnote 14:

> ". . . The Court of Appeals, nonetheless, argued that opportunity for a hearing and a statement of reason were required here 'as a *prophylactic* against nonretention decisions improperly motivated by exercise of protected rights.' [citation] (emphasis supplied). While the Court of Appeals recognized the lack of finding that respondent's nonretention was based on exercise of the right of free speech, it felt that the respondent's interest in liberty was sufficiently implicated here because the decision not to rehire him was made 'with a background of controversy and unwelcome expressions of opinion.' . . .
>
> "When a State would directly impinge upon interests in free speech or free press, this court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive

[26]Nor is there an allegation of actual inhibition of free speech rights.

> First Amendment standards . . . . [¶] In the respondent's case, however, the State has not directly impinged upon interests in free speech or free press in any way comparable to a seizure of books or an injunction against meetings. Whatever may be a teacher's right of free speech, the interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest." (408 U.S. at 575.)

Petitioner has not alleged any specific conduct in which its members wish to engage that has a substantial certainty of resulting in adverse consequences under the statutory scheme in question. As free speech is not limited by the statutes either on their face or as applied, and in light of the *Roth* decision concerning due process requirements, the need for a prophylactic against possible free speech infringement is highly speculative at best. Petitioner's attempt to raise free speech as an issue obviously fails.

As established above, neither continued government employment nor tenure is a fundamental right. In the absence of tenure, temporary part-time employees simply have no due process right to be included under any statutory notice and hearing provisions. No right to free speech is affected in any way by the statutory scheme either on its face or as applied. Moreover, the classification of temporary part-time teachers based on the 60 percent or less statutory limit does not involve any suspect criteria. Thus, Petitioner's dissatisfaction with the classifications, provisions and implications of the statutory scheme centered on § 87482 [13337.5] is not of constitutional magnitude and need not be addressed by this Court.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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October 31, 1979